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No. 10-605

In the
Supreme Court of the United States

HOME BUILDERS ASSOCIATION
OF NORTHERN CALIFORNIA; et al.,
Petitioners,

v.

UNITED STATES FISH
AND WILDLIFE SERVICE; et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Home Builders Association of Northern California, *et al.*, seek review of the Ninth Circuit Court of Appeals' decision authorizing grossly inadequate economic impact analyses under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. The arguments of Respondents United States Fish and Wildlife Service, *et al.*, and Respondents Defenders of Wildlife, *et al.*, against a grant of certiorari are without merit.

First, the Ninth Circuit's decision *does* squarely conflict with the Tenth Circuit's decision in *New Mexico Cattle Growers Association v. United States Fish & Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). The Ninth Circuit below, in following *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (petition for certiorari pending, No. 10-454), recognized as much. *See* Pet. App. A-20. Moreover, the Tenth Circuit's holding—that the Service must take into account more impacts than just those directly caused by critical habitat designation—is irreconcilable with the Ninth Circuit's holding below that no impacts other than those directly caused by designation need be assessed. And nothing in subsequent case law or regulatory practice undercuts *New Mexico Cattle Growers* within the Tenth Circuit.

Second, the Service and Defendant-Intervenors entirely ignore the significant nationwide impact of the Ninth Circuit's decision and the rule it enunciates. Whatever role that impact may have in the Court's legal analysis of the underlying issues, it is undeniably relevant to determining whether the writ should be granted. *See* Sup. Ct. R. 10(a) (certiorari may be warranted where decisions of federal courts of appeals

conflict on an "important matter"); Eugene Gressman, *et al.*, Supreme Court Practice 269 (9th ed. 2007).

Third, Petitioners' cumulative economic impacts issue is properly presented to this Court. Petitioners briefed and argued it below, and the panel's decision directly addressed it.

Finally, the Service's and Defendant-Intervenors' many arguments as to why the Ninth Circuit got it right, *see* Serv. Opp'n at 7-9; Def.-Int. Opp'n at 1-12, are irrelevant to whether review is merited in this Court. Those arguments do, however, highlight the exceptional importance of the issue presented—whether the Service can ignore the significant economic consequences of its regulations in contravention of the ESA's command that the Service "take into consideration" such consequences prior to designating critical habitat. *See* 16 U.S.C. § 1533(b)(2).

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION BELOW CONFLICTS WITH THE TENTH CIRCUIT'S DECISION IN *NEW MEXICO CATTLE GROWERS*

A. The Service's Various Rationales for Reconciling *New Mexico Cattle Growers* with Ninth Circuit Case Law Are Unconvincing

The Service argues that there is no conflict between the decision below and the Tenth Circuit's ruling in *New Mexico Cattle Growers*. Serv. Opp'n at 10. That contention is without merit. The Ninth Circuit below, in rejecting Petitioners' arguments

about cumulative economic impacts, equated those arguments with an attack on the "baseline" approach. The Ninth Circuit in *Arizona Cattle Growers* expressly approved the "baseline" approach whereas the Tenth Circuit in *New Mexico Cattle Growers* expressly disapproved it. *See* Pet. App. A-20. Indeed, the panel below quoted *Arizona Cattle Growers* specifically to establish that the Ninth Circuit had already "rejected the notion that '[the Service] was required to attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation.'" *Id.* (quoting *Ariz. Cattle Growers Ass'n*, 606 F.3d at 1172). That *Arizona Cattle Growers* (and by extension the panel below) rejected *New Mexico Cattle Growers* is beyond dispute. *See Ariz. Cattle Growers Ass'n*, 606 F.3d at 1173 ("We therefore reject the Tenth Circuit's approach in *New Mexico Cattle Growers Association* as relying on a faulty premise and hold that the [Service] may employ the baseline approach in analyzing the critical habitat designation.").

Contrary to the view of the Service, *see* Serv. Opp'n at 10-11, and the Defendant-Intervenors, *see* Def.-Int. Opp'n at 13-14, it is irrelevant whether Petitioners or the Service or anybody else believes that *Arizona Cattle Growers* or the decision below is reconcilable with *New Mexico Cattle Growers*; what matters is that the *Ninth Circuit* recognized and held that the rule it adopted is in conflict with the rule adopted by the Tenth Circuit, and that the Tenth Circuit's rule is not acceptable in the Ninth Circuit.

In a related vein, the Service contends that *New Mexico Cattle Growers* actually undercuts Petitioners' cumulative impacts argument. *See* Serv. Opp'n at 8-

10. The Service reads *New Mexico Cattle Growers* as rejecting the baseline approach but as not addressing whether "economic conditions that have no connection at all to [the Service's] own actions" should be considered. Serv. Opp'n at 10. It is true that *New Mexico Cattle Growers* did not decide just how many impacts should be assessed other than those for which critical habitat designation is a but-for cause. But it *did* hold that at least some impacts for which critical habitat is *not* a but-for cause *should* be considered. *See New Mexico Cattle Growers*, 248 F.3d at 1285 ("[W]e conclude Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes."). Petitioners' arguments build upon and are consistent with *New Mexico Cattle Growers*.[1] The Ninth Circuit panel below evidently agreed in holding that those arguments were foreclosed because *Arizona Cattle Growers* had already rejected the rule of *New Mexico Cattle Growers*. *See* Pet. App. A-20.

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[1] Contrary to the Service's assertions, Serv. Opp'n at 10, it is irrelevant that the district court below held that the Service had complied with *New Mexico Cattle Growers*. The analysis that *New Mexico Cattle Growers* prescribes is necessary – but not sufficient – to discharge the ESA's economic impact assessment obligation. Moreover, Defendant-Intervenors' contention that review in this Court is unnecessary because even should Petitioners prevail, the outcome would likely change little, *see* Def.-Int. Opp'n at 12-13, misses the mark. Whether the Service has discretion on remand in how to respond to a properly executed economic analysis in no way relieves the Service of doing the job right. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

The Service's contention that *New Mexico Cattle Growers* did not address whether impacts unrelated to the ESA (as opposed to impacts unrelated to critical habitat designation only) may be assessed is untenable. Several courts have rejected *New Mexico Cattle Growers* because of their disagreement with the Tenth Circuit's resolution of the *precise* issue which, the Service asserts, the Tenth Circuit did not reach—namely, whether the Service may consider *any* impacts (be they attributable to the ESA or not) for which critical habitat designation is not a but-for cause.

For example, *Arizona Cattle Growers* rejected *New Mexico Cattle Growers* and the baseline approach on the grounds that "[t]he very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made," *i.e.*, costs for which critical habitat designation is *not* a but-for cause). *See Ariz. Cattle Growers*, 606 F.3d at 1173.

The district court in *Arizona Cattle Growers* also observed that, "[w]here a [*New Mexico Cattle Growers*] approach is taken, the Service goes beyond the command of the ESA by examining impacts that exist independent of the critical habitat designation." *See Ariz. Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1035 (D. Ariz. 2008).

Similarly, the district court in *Fisher v. Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009), stated that "[c]osts that exist independently of the critical habitat designation cannot be costs 'of specifying any particular area as critical habitat,'" and that, "[t]o the extent the Tenth Circuit's . . . approach permits consideration of costs not attributable to the

designation, it is inconsistent with the mandate of the ESA." *Id.* at 1371.

Further, the district court in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006), noted that it was "not persuaded by the reasoning of *New Mexico Cattle Growers*," which it equated with the proposition that "the Service must consider *all* impacts of a critical habitat designation, including coextensive impacts." *Id.* at 1152 (emphasis added).

Finally, the D.C. District Court held in *Cape Hatteras Preservation Alliance v. United States Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), that the ESA does not mandate that "the Service must consider *all* impacts," for the "Service . . . must not allow the costs below the baseline to influence its decision to designate or not designate areas as critical habitat." *Id.* at 129-30 (emphasis added).

As is evident, none of these decisions employs the Service's "no connection at all" rationale, by which the Service tries to reconcile *New Mexico Cattle Growers* with the decision below. The absence of support confirms both the implausibility of the Service's reading, as well as the correctness of Petitioners' contention that the panel decision below, along with *Arizona Cattle Growers*, conflicts with *New Mexico Cattle Growers*.

B. *New Mexico Cattle Growers* Has Not Been Undercut by Subsequent Regulatory or Case Law Developments

Defendant-Intervenors, for their part, argue that there is no conflict because *New Mexico Cattle Growers* is defunct. Specifically, Defendant-Intervenors contend that the Tenth Circuit's decision has become outmoded because it is based on the Service's "destruction or adverse modification" regulation, *see* 50 C.F.R. § 402.02, which was invalidated by the Ninth Circuit in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). *See* Def.-Int. Opp'n at 6-10.

Defendant-Intervenors reason that, because *Gifford Pinchot* rejected the Service's position that critical habitat has no impact, and because *New Mexico Cattle Growers* was based on that now rejected position, it follows that *New Mexico Cattle Growers* is no longer good law. *See* Def.-Int. Opp'n at 7-8. In that case, the Service had expressed its longstanding view that critical habitat provided little if any benefit to species and, consequently, was "unhelpful, duplicative, and unnecessary." *New Mexico Cattle Growers*, 248 F.3d at 1283. But the court's criticism of the Service must be taken in context. The court was explaining the origin of the Service's position that critical habitat designation produces *no* impact. Yet the legal error in the Service's practice of assessing only those economic impacts for which critical habitat was a but-for cause was *not* the result of the Service's position that critical habitat fails to foster recovery, the issue in *Gifford Pinchot*. Rather, *New Mexico Cattle Growers* overturned the Service's wholly distinct position that,

because many if not all direct impacts of critical habitat designation can also be traced to the species's listing, the Service need not assess *any* of those impacts when designating critical habitat. *See id.* at 1283-84. The range of costs attributable to critical habitat designation has little to do with whether and how such designation should foster a species's recovery.

Because the Service's definition of "destruction or adverse modification" required an appreciable diminishment of critical habitat's survival *and* recovery components (not just a diminishment in recovery potential), *Gifford Pinchot* concluded that the definition was inconsistent with the ESA-mandated recovery goals of critical habitat. *See* 378 F.3d at 1069-70. Nothing in that holding is inconsistent with the rule announced in *New Mexico Cattle Growers*. In following *Gifford Pinchot*, the Service must take recovery into account when assessing the benefits of critical habitat designation. In following *New Mexico Cattle Growers*, the Service cannot ignore certain impacts of critical habitat designation simply because the designation is not a but-for cause of those impacts. *Gifford Pinchot* speaks to the "benefits" side of the critical habitat ledger; *New Mexico Cattle Growers* to the "costs" side. There is no inconsistency between the two cases. Consequently, *New Mexico Cattle Growers* remains good law, and the split between the Ninth and Tenth Circuits still exists.

II

THE NINTH CIRCUIT'S DECISION WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

Petitioners explained in their writ petition how the Ninth Circuit's decision and the rule it adopts will have national impact, and how that impact will be significant. *See* Pet. at 12-20. The Service and Defendant-Intervenors, by their silence, apparently concede that the decision will be "nationalized." Yet with regard to the significant impact of that nationalization, the Service and Defendant-Intervenors respond that Petitioners' "policy disagreements" or "policy preference" over environmental regulation and the ESA are not of this Court's concern. *See* Serv. Opp'n at 11; Def.-Int. Opp'n at 13. Those contentions are only partly correct.

Petitioners do not contend that the Ninth Circuit's decision is legally wrong because it will have bad results. Rather, Petitioners contend that review in this Court is proper in part because the decision below is wrong on the law in a way that will have profound and negative impacts on land-use and economic activity throughout the country. Those impacts support review of the decision in this Court. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. 211, 214 (1991) (observing that certiorari was merited "in light of the economic interests at stake" in a legal dispute over "the national market for natural gas"). *See also Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (fact that lower court decision would create additional Social Security costs of $80 billion relevant to grant of certiorari); *Comm'r v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151

n.5 (1977) (fact that dispute concerned more than $100 million relevant to grant of certiorari), *cited in* Gressman, *supra*, at 269.

III

THE CUMULATIVE ECONOMIC IMPACT ISSUE IS PROPERLY BEFORE THIS COURT

Both the Service and Defendant-Intervenors make several arguments as to why the issue of cumulative economic impacts and critical habitat designation has not been properly presented.

The Service and Defendant-Intervenors argue that Petitioners contended below that *Arizona Cattle Growers* was consistent with their cumulative impacts argument. *See* Serv. Opp'n at 10-11; Def.-Int. Opp'n at 13-14. As noted above, the criticism misses the point. What matters is that the panel below *held* that Petitioners' argument (and the rule it advocates) is foreclosed by *Arizona Cattle Growers*, which itself expressly diverges from *New Mexico Cattle Growers*.

Defendant-Intervenors also contend that Petitioners did not brief the cumulative impacts issue, and that they are merely repackaging a separate and unsuccessful claim under the National Environmental Policy Act (NEPA). *See* Def.-Int. Br. at 14-15. Not so. Petitioners briefed the cumulative economic impacts issue: indeed, the fifth of their six issues on appeal was: "Whether the Service violated the ESA . . . by failing to assess the cumulative economic impact of the designation." Petitioners argued the issue. *See* Pet. App. A-18-A-19. And the panel below specifically addressed the issue. *See id.* at A-18-A-20. Petitioners did raise a NEPA claim and argued for their

cumulative impacts claim by analogy to NEPA because although NEPA does not mandate a cumulative impacts analysis, both the federal government and the courts have determined that an impacts analysis would not be complete without a consideration of the cumulative effects of the federal action. *See* Pet. App. A-19; Serv. Opp'n at 6. But Petitioners always treated the two claims as distinct.

Both the Service and Defendant-Intervenors castigate Petitioners for not citing *New Mexico Cattle Growers* below. *See* Serv. Opp'n at 8-9; Def.-Int. Opp'n at 14. But they do not explain what the utility would have been of relying on a Tenth Circuit decision that had been expressly rejected by a Ninth Circuit decision, when litigating an appeal in the Ninth Circuit. To be sure, Petitioners attempted, unsuccessfully, to distinguish that adverse Ninth Circuit precedent (*Arizona Cattle Growers*). But Petitioners are not now arguing that their view of the law was incorrect. Rather, they argue that their view of the law was *rejected* by the Ninth Circuit, and that the Ninth Circuit's *rejection* of Petitioners' view of the law has created a *conflict* with the Tenth Circuit.

Petitioners' cumulative impact claim is properly presented to this Court.

CONCLUSION

The Ninth Circuit's decision, which conflicts with a decision of the Tenth Circuit, will have a nationwide and severe impact which will be exacerbated in these difficult economic times. Petitioners' challenge to that

decision is properly presented. The petition should therefore be granted.

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Respectfully submitted,

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